No. 5

In the Supreme Court of the United States

OCTOBER TERM, 1957

CHARLES ROWOLDT, PETITIONER

v.

J. D. PERFETTO, Acting Officer in Charge, Immigration and Naturalization Service, Department of Justice, St. Paul, Minnesota

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT AFTER REARGUMENT

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This memorandum is submitted in response to certain questions asked from the bench during the reargument on October 14, 1957. We submit the factual information requested, without comment or argument.

I.

Mr. Chief Justice Warren requested information as to the subsequent proceedings in the *Garcia* case referred to in the Government's original brief in this case at pp. 36-37. That information is as follows:—

Certiorari was granted in *Garcia* v. *Landon* on June 7, 1954 (347 U.S. 1011). On August 11, 1954, the Immigration and Naturalization Service made a motion before the Board of Immigration Appeals to withdraw the outstanding order of deportation against Garcia and, in the light of this Court's opinion in *Galvan* v. *Press*, 347 U.S. 522, to have the proceedings reopened to afford Garcia an opportunity to present such further evidence as he wished on the question of whether his membership in the Communist Party was voluntary, as well as to file an application for discretionary relief under the Immigration and Nationality Act of 1952.[1] Garcia did not oppose the motion, and on September 21, 1954, the Board of Immigration Appeals granted the motion and ordered that the warrant of deportation be withdrawn. This action was brought to the attention of the Court by the Solicitor General, in October 1954, in a Memorandum Suggesting That The Cause is Moot. On November 8, 1954, the Court vacated the judgment of the Court of Appeals and remanded the case to the District Court with directions to dismiss the petition for writ of habeas corpus upon the ground that the cause was moot. *Garcia* v. *Landon*, 348 U.S. 866.

Thereafter, on January 31, 1955, Garcia's deportation hearing was reopened before a Special Inquiry Officer at Los Angeles; the hearing was completed on August 23, 1955. Garcia testified at this reopened hearing. On September 22, 1955, the Special Inquiry

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[1] Such discretionary relief was not available under the Internal Security Act of 1950 to aliens found to have been members of the Communist Party.

Officer, upon the basis of all the evidence (including that taken at the original hearings and that taken at the reopened hearing), found that Garcia had been "a voluntary member of the Communist Party of the United States at Los Angeles, California in 1939 and 1940", and was deportable on that ground. The Special Inquiry Officer denied discretionary relief on the ground that Garcia was statutorily ineligible for suspension of deportation under Section 244(a)(5) of the 1952 Act because he had been absent from the United States for less than one day on May 15, 1949, and therefore could not establish that he had been physically present in the United States for a period of ten years preceding his application for suspension of deportation as required by Section 244(a)(5).

On January 25, 1956, the Board of Immigration Appeals, on Garcia's appeal, affirmed as to both issues, *i.e.*, deportability and ineligibility for discretionary relief.

On January 31, 1956, Garcia filed an action for judicial review of, and injunctive relief against, the new order of deportation. *Carlos Alvarez Garcia* v. *Barber, et al.*, U.S. Dist. Ct. for the Southern District of California, Civil Action No. 19428-WB.

On September 21, 1956, while the District Court action was still pending, the Commissioner of Immigration and Naturalization, upon a review of Garcia's case, determined that "certain compassionate features" had been disclosed which warranted further investigation. On October 15, 1956, the Commissioner filed a new motion with the Board of Immi-

gration Appeals asking for the withdrawal of the outstanding order of deportation and that the hearing be reopened and remanded to the Special Inquiry Officer for further consideration of eligibility for discretionary relief. The motion stated that because of the "appealing factors" in Garcia's case, "and in the absence of any further derogatory information, careful consideration must be given to the availability of any means whereby the immigration status of the respondent may be adjusted"; the Service proposed, the motion also stated, to conduct an investigation into Garcia's activities and "if the report is favorable to the respondent [Garcia], consideration should then be given by the special inquiry officer as to whether the respondent can qualify under the law for the privilege of voluntary departure" (which would make him eligible for consideration for the issuance of an immigrant visa under Section 212(a)(28)(I)(ii) of the 1952 Act).

On November 9, 1956, the Board of Immigration Appeals ordered, in response to this motion, that the outstanding order and warrant of deportation be withdrawn, and the proceedings reopened. The Board stated: "The Service is motivated by a desire to help the alien adjust his status to that of a lawfully permanent resident alien, if it is at all possible and if the results of a current character investigation reveal that discretionary relief is appropriate. * * * It is apparent that the Service believes it will have more freedom in assisting this alien to adjust his status if the outstanding order and warrant of deportation are withdrawn. We have the utmost con-

fidence that the Service will take no action which would endanger the health of the respondent and it may well be that the Service can find means of assisting the respondent without requiring him to either appear at formal hearings or requiring him to be absent from his family for any extended period." [2]

Thereafter, on November 13, 1956, the Commissioner of Immigration and Naturalization, on the basis of the various factors in Garcia's case, directed that his case be placed in the non-priority inactive category with no further administrative proceedings to be taken. If at the end of a year the Regional Commissioner at San Pedro, California, was of the view that circumstances had changed sufficiently to warrant a change in the non-priority designation, the case could be again submitted to the Commissioner in Washington.

On November 21, 1956, by stipulation of counsel, and an order of the District Court, Garcia's action in the Southern District of California (Civil Action No. 19428-WB) was discontinued and dismissed without prejudice and without costs. The order of dismissal was entered on November 26, 1956.

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[2] The Board had already noted, in its opinion on the new motion to reopen, that Garcia's counsel had stated, with respect to that motion, that he would welcome a reopening were it not for the fact that Garcia was in ill health and could not stand the strain of additional hearings or the separation from his family while awaiting an immigrant visa outside the country; counsel also questioned whether Garcia had sufficient funds for this purpose.

II.

Mr. Justice Frankfurter inquired whether any instructions or regulations were issued by the Department of Justice or the Immigration and Naturalization Service, after the decision in *Galvan* v. *Press*, 347 U.S. 522, with respect to the meaning or content of "membership". No such instructions or regulations were issued.

III.

Mr. Chief Justice Warren inquired whether the Communist Party was on the ballot in Minnesota in 1935. According to the Statistical Abstract of the United States (1937), p. 159, the 1936 presidential nominee of the Communist Party was on the ballot in Minnesota.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

OCTOBER 17, 1957

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